IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.46 OF 2007
IN
ARBITRATION PETITION NO.451 OF 2004

Vimal G. Jain
of Bombay, Indian Inhabitant,
having his address at 4/2,
Jawahar Mansion, 4th Floor,
12-Keshavji Naik Road,
Bhai Bazar, Bombay-400 009. .... Appellant

- Versus -

1. Vertex Financial Services
Pvt. Ltd., a Private Limited
Company registered under
the Companies Act, 1956,
having their office
address at 18, East Street,
East Street Camp,
Pune-411 001.

2. Shilpa Stock Brokers Pvt.
Ltd., a Private Limited
Company registered under
the Companies Act, 1956,
having their office address
at Jeejee Bhoy Towers,
Dalal Street, Bombay -
400 023. .... Respondents

Shri Bharat Vaishnawa with Ms Nuzya Qureshi
i/b M/s. Bharat Vaishnawa & Co. for the
Appellant.

Shri Simil Purohit i/b M/s. Purohit & Co.
for the Respondents.

CORAM: R.M.S. KHANDEPARKAR &
Dr. D.Y. CHANDRACHUD, JJ.

DATED: FEBRUARY 12, 2007

ORAL JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Admit. The learned Advocate for the respondents

waives service. By consent, heard forthwith.

2. This appeal arises from the order dated 10-1-2005 passed in Arbitration Petition No.451 of 2004. By the impugned order, the arbitration petition filed for setting aside the award made by the arbitration committee of the Stock Exchange has been dismissed.

3. The challenge to the impugned order is on two grounds: firstly, that the learned single Judge failed to take note of the fact that the arbitration proceedings were sought to be initiated after the expiry of the period of limitation, as prescribed under the Bye-laws and secondly that the appellant had already paid a sum of Rs.5,00,000/- to the respondents.

4. Perusal of the impugned order apparently discloses that the point regarding bar of limitation was not raised before the learned arbitrator and, therefore, the same being a mixed question of law and fact, the learned single Judge has rejected the petition under Section 34 of the Arbitration and Conciliation Act, 1996, hereinafter called as "the said Act", which was to be filed on the said ground of bar of limitation. Secondly, the contention about the payment of Rs.5,00,000/- to the respondents has been rejected as the records, based on which the award was passed,

evidently disclosed that the sum of Rs.5,00,000/- was paid prior to the formation of the company to the two persons, who thereafter became the Directors of the said company and not to the respondent-company inspite of the admitted fact that the appellant was liable to pay the amount to the respondent-company.

5. As regards the first ground of challenge, placing reliance in the decisions in the matters of **Management of the State Bank of Hyderabad v. Vasudev Anant Bhide and others,** reported in AIR 1970 SC 196 and **Ramesh B. Desai and others v. Bipin Vadilal Mehta and others,** reported in (2006) 5 SCC 638, as also Bye-law 252 of the Bye-laws applicable to the parties, the learned Advocate appearing for the appellant submitted that in terms of Clause (2) of Bye-law 252, an arbitration proceedings ought to have been initiated within six months from the date of cause of action and the same having not been so initiated, the arbitrator had no jurisdiction to entertain the proceedings and the learned single Judge failed to take into consideration this aspect of the matter. It was also sought to be contended that the Apex Court has clearly held that plea of limitation can be raised, even for the first time, at the appellate stage. The learned Advocate appearing for the respondents, on the other hand, drawing attention to Clause (2) of Bye-law 252 of the said Bye-laws, and more

particularly to the third proviso thereto, submitted that the amended Bye-laws came into force from 4-6-2003 and the proceedings were initiated in September, 2003. Hence, they were within the period of limitation.

6. As regards the second ground of challenge, attention was sought to be drawn to the copy of the statement of account of the respondents, prepared and based on the books of account maintained by the appellant and it was sought to be contended that the same reveal payment of Rs.5,00,000/- to the Directors of the respondent-company. On the other hand, it is sought to be argued that admittedly the amount was paid prior to the formation of the company.

7. Considering the rival contentions on behalf of the parties to the proceedings, the following points arise for consideration:

(i) Whether the arbitration proceedings were initiated within the period of limitation prescribed under the Bye-laws?

(ii) Whether the amount of Rs.5,00,000/- was paid to the respondent-company?

8. The Section 4 of the said Act provides that:

> "4. Waiver of right to object:- A party who knows that -
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> (a) any provision of this Part from which the parties may derogate, or
>
> (b) any requirement under the arbitration agreement,
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> has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

Further, the Section 16(2) of the said Act clearly provides that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of, an arbitrator. Conjoint reading of the above provisions of law would disclose that a party to

the arbitration proceedings seeking to raise the point of bar of limitation for initiating the arbitration proceedings should raise the issue at the earliest opportunity and in any case not later than the submission of the statement of defence, otherwise it would be deemed to have been waived. The law in that regard is well-settled by the decision of the Apex Court in **Narayan Prasad Lohia v. Nikunj Kumar Lohia and others,** reported in (2002) 3 SCC 572 wherein it has been clearly held that unless the objection in terms of Section 16(2) is raised within the time prescribed under the said Section, it would be deemed to have been waived in terms of Section 4 of the said Act. In the case in hand, undisputedly, the point regarding the bar of limitation was never raised before the learned arbitrator. Being so, it should be deemed to have been waived.

9. Even otherwise, the point of limitation is a mixed question of law and fact. In fact, the law in this regard also is well-settled and the same was reiterated by the Apex Court in the decision sought to be relied upon on behalf of the appellant himself. In **Ramesh Desai's** case (supra), it was clearly observed by the Apex Court that "A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be

ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact.". Once it is clear that the point of limitation was not raised before the learned Arbitrator, apart from the fact that it is deemed to have been waived, the question of entertaining such point in proceedings under Section 34 of the said Act or in an appeal arising from the order passed therein, cannot arise. Hence no fault can be found with the impugned order in that regard.

10. The decision of the Apex Court in the matter of **Management of the State Bank of Hyderabad** (supra) has no application to the facts of the case in hand. That was a case arising out of the Industrial Disputes Act and there is no provision on par with Section 4 r/w Section 16(2) of the said Act, either in the Industrial Disputes Act or any other Act dealing with the service conditions of the Bank employees. Hence the ruling of the Apex Court in the Management of the State Bank of Hyderabad’s case is of no help to the appellant to seek interference in the impugned order.

11. Even on merits, there is absolutely no substance as far as the plea of limitation is concerned. The Clause 252(2) of the said Bye-laws, which deals with the period for filing an arbitration reference, in its third proviso, clearly provides that "in respect of

Arbitration Cases arising out of the transactions having been done prior to the date on which this Bye-law comes into effect, the limitation period of six months shall be computed from the date on which this Bye-law comes into effect.". Undisputedly, the said Bye-law came into force from 4-6-2003. It is also not in dispute, nor can be disputed that the proceedings in question were initiated in September, 2003. Obviously, the same were initiated within a period of six months from the date of coming into force of the said Bye-laws and hence the same were initiated within the period of limitation.

12. As regards the second ground of challenge regarding the payment of Rs.5,00,000/-, the finding arrived at by the learned single Judge is clearly borne out from the award which, in turn, is based on the records and it is not in dispute that sum of Rs.5,00,000/- was paid to the persons who subsequently became the Directors of the company, but the payment to them was prior to the formation of the company. Being so, the said finding also cannot be found fault with.

13. As no other ground is disclosed or urged for challenging the impugned order, the appeal fails and is hereby dismissed. There shall be no order as to costs.

(Dr.D.Y.Chandrachud, J.) (R.M.S.Khandeparkar, J.)

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